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MANHATTAN LIFE INSURANCE COMPANY

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH P. FEHL, Plaintiff, vs. MANHATTAN INSURANCE GROUP; DOES 1 through 20, Defendants.	CASE NO. CV 11-02688 LHK **REPLY IN SUPPORT OF MANHATTAN INSURANCE GROUP AND MANHATTAN LIFE INSURANCE COMPANY'S MOTION TO DISMISS** Date: January 5, 2012 Time: 9:00 a.m. Courtroom: 3

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INTRODUCTION

Nothing in Plaintiff's Opposition to Defendants' Motion for Dismissal presents any reason for the Court to deny Defendants' motion. Defendants argued (1) that Plaintiff's claims are barred by the applicable statutes of limitations, (2) that Plaintiff's claims against Defendant Manhattan Life Insurance Company[1] are

[1] The pending motion to dismiss was filed on behalf of "Manhattan Life Insurance," mistakenly omitting "Company." The correct name of the defendant appearing voluntarily to contest service is "Manhattan Life Insurance Company." This correction causes no prejudice to Plaintiff, who opposed the motion identifying the moving party correctly throughout his brief as "Manhattan Life Insurance Company."

uniquely and separately barred, as they fail to 'relate-back', and (3) that Plaintiff failed to plead his claim for breach of oral contract with sufficient particularity, requiring a more definite statement.

In opposition, Plaintiff makes only one argument as to the statutes of limitations: Plaintiff claims survive by application of the so-called "discovery rule," and did not accrue until he actually discovered the Defendants' breach. This is not only a misstatement of the discovery rule, under which a plaintiff "discovers" wrongdoing when he or she had or should have had reasonable suspicion of it, but it also ignores the specific pleading requirements of the discovery rule. Plaintiff's complaint failed to plead even a single fact that would entitle him to the protection of the discovery rule, and Plaintiff thus cannot raise the rule as an excuse for his delay in bringing this action.

Plaintiff also makes a single argument in opposition to Defendant Manhattan Life Insurance Company's contention that his late amendment, adding Manhattan Life Insurance Company as a party to the action, does not 'relate-back' to the filing of the initial complaint. Plaintiff argues that his prior failure to name Defendant Manhattan Life Insurance Company caused no prejudice, and is unnecessary as the two parties are "in essence the same." Notably, Plaintiff does not claim that the existence of Manhattan Life Insurance Company was previously *unknown* to him. Nor can he credibly argue this point — in opposition to Defendants motion, Plaintiff signed under penalty of perjury a declaration attaching August 14, 2000 correspondence from Manhattan Life Insurance Company, with that Defendant's name conspicuously printed throughout that document.

Lastly, Plaintiff apparently concedes the failure to adequately allege his claim for breach of oral contract. Instead, he supplied a confusing narrative of facts which are absent from the pleadings.

As such, the Court should conclude that Plaintiff's complaint fails to state a claim for which relief can be granted and, pursuant to Federal Rule of Procedure

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12(b)(6), grant Defendant's motion to dismiss.

ARGUMENT

I. PLAINTIFF'S FAILURE TO FILE A TIMELY OPPOSITION BRIEF

The failure to file an opposition to a motion to dismiss in the manner prescribed by the Court's Local Rules qualifies as grounds for dismissal under Federal Rule of Civil Procedure 41(b). (*Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995)).

Defendants' motions are now calendared for hearing on January 5, 2012. Under Civil Local Rule 7-3, an opposition to a motion is due two weeks after the motion is filed. Since Defendants filed their motions on July 25, 2011, Plaintiff's opposition was due on or before August 8, 2011. Plaintiff failed to file an opposition until December 13, 2011, more than fourth months late, despite a written reminder — in the form of Defendants' August 15, 2011, "Notice of Non-receipt of Opposition." (Dckt #23).

Self-represented Plaintiff Kenneth Fehl is listed as an active member of the California bar, admitted in 1976, and no doubt familiar with the significance of filing deadlines. Despite Defendants' express reminder, Plaintiff's Opposition brief failed to explain or justify his four-month delay.

On this basis alone, this Court may exercise discretion to disregard the Opposition and dismiss the action in its entirety. (*Ghazali* at 53; *Fox v. American Airlines, Inc.*, (DC Cir. 2004) 389 F3d 1291, 1294.)

II. THE "DISCOVERY RULE" DOES NOT EXCUSE PLAINTIFF'S DELAY

Plaintiff makes a single argument as to why his claims are not time-barred by the applicable two and four-year statutes of limitation: Plaintiff argues that, under the so-called "discovery rule," these limitations periods did not begin to

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accrue until Plaintiff had actually discovered the notice of repudiation of the insurance policy "sometime after" August 7, 2007. (Plaintiff's Opposition to Defendant's Motion for Dismissal at 5:2-8 (filed Dec. 12, 2011) ("Opp.").) This argument is erroneous.

The so-called "discovery rule" does not give Plaintiff an unlimited period to sue — even if he could establish ignorance of the relevant facts. Contrary to Plaintiff's contention, the "discovery rule" does not postpone accrual of a cause of action until a plaintiff has actually discovered the relevant facts. Instead, courts have interpreted the "discovery rule" to mean that a plaintiff "discovers" his or her cause of action when "the plaintiff suspected or should have suspected" the defendant's wrongdoing. (*Kline v. Turner*, 87 Cal. App. 4th 1369, 1374 (2001) (citing *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1110-11 (1988)). Thus, the statute of limitations begins to run "when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation . . ." (*Gen. Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1397 (9th Cir. 1991) (applying California law); *see also Kline*, 87 Cal. App. 4th at 1374.)

This interpretation of the "discovery rule" has further led courts to impose the following requirement on plaintiffs seeking protection from the rule:

> "The rule is that the plaintiff *must plead and prove the facts* showing: (a) Lack of knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when he did actually discover the fraud or mistake."
>
> (*Gen. Bedding Corp.*, 947 F.2d at 1397 (emphasis in original)).

Plaintiff's complaint does not satisfy these pleading requirements, because he does not allege that he was unaware of the alleged breach on August 4, 2006, nor does he allege how and when he actually discovered the alleged breach.

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Plaintiff now attempts to skirt his own pleadings by contradicting them—without explanation—through a signed declaration: Plaintiff now believes that the premium was not returned until "*on or after August 7, 2008*" for the unstated inference that Plaintiff was without actionable knowledge of the alleged breach on August 4, 2006. (Opp. at 3:5-16.) However, Plaintiff earlier alleged he was "notified" of the alleged breach on August 4, 2006. As alleged in the operative complaint, "*[o]n or about August 4, 2006, nearly nine months later, Defendants notified Plaintiff that Defendants were refunding his premium payment of $1,064, with their check no. 1110165841 dated August 2, 2006.*" The new facts evidence a misunderstanding of the nature of a pleading requirement; for a plaintiff to take advantage of the "discovery rule," he or she must expressly plead certain facts that would support the application of that rule: lack of knowledge, lack of means of obtaining knowledge, and how/when the breach was discovered.

For this reason alone, the Court should conclude that Plaintiff has failed to state claims on which relief can be granted. See, e.g., *Adler v. Taylor*, No. CV 04-8472-RGK, 2005 U.S. Dist. LEXIS 5862, at 13 (C.D. Cal. Feb. 2, 2005) (dismissing a claim under Federal Rule of Civil Procedure 12(b)(6) and holding: "The Complaint fails to allege any diligence on Plaintiffs' part, much less any reasonable diligence. Thus, even if the discovery rule applied to this case, Plaintiffs have still failed to state a claim.")

III. PLAINTIFF FAILED TO SUBMIT EVIDENCE OF VALID SERVICE ON MANHATTAN LIFE INSURANCE COMPANY WARRANTING DISMISSAL

Plaintiff's argument that Defendant Manhattan Life Insurance Company waived any defects in service by making a "general appearance" is incorrect. In federal court, the proper procedural device to attack defects in service of process is by motion under FRCP 12(b)(6), or in a defendant's responsive pleading. (*SWEC*

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v. Wencke (9th Cir. 1986) 783 F 2d 829, 832, fn. 3)

Where the validity of service is contested by Rule 12 motion, the burden is on plaintiff to establish the validity of service. William R. Schwarzer, et al., *Federal Civil Procedure Before Trial*, § 9:148 (2006) (citing *Norlock v. City of Garland*, 768 F.2d 654, 656 (5th Cir. 1985); *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F2d 476, 488 (3rd Cir. 1993)).

Defendant Manhattan Life Insurance Company challenged Plaintiff's service of the complaint: Plaintiff failed to effect service whatsoever, as outlined in the moving papers. (Motion. 6:25-28,7:1-3). In opposition, Plaintiff effectively concedes service has not been accomplished on Defendant Manhattan Life Insurance Company, and instead argued service is unnecessary, as Manhattan Insurance Group and Manhattan Life Insurance Company "are in essence one and the same." (Opp. 6:12-13).

Due process requirements prohibit Plaintiff's argument that Defendants are "one and the same." A parent-subsidiary relationship does not itself make one corporation the agent for service of process of the other. Thus, service on parent Defendant Manhattan Insurance Group, effected by Plaintiff's *ex parte* order permitting service on the California Secretary of State, **does not** effect service on subsidiary Defendant Manhattan Life Insurance Company. For example, a dismissal for failure to name a corporate parent of Allied Signal Inc., was affirmed on appeal, holding that "the district court properly ruled that plaintiffs had failed to serve" the defendant within 120 days. (*Adams v. AlliedSignal General Aviation Avionics* (8th Cir.1996) 74 F.3d 882, 885. (8th Cir. Mo. 1996) In reaching this conclusion, the Eight Circuit Court of Appeals noted "[t]he need to identify the proper corporate defendant is apparent to any practicing attorney," (*Id* at 886; see also *United States ex rel. Vallejo v. Investronica, Inc.* (WD NY 1998) 2 F.Supp 2d 330, 335)

Under Federal Rule of Civil Procedure 4(m), if service of process is not

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accomplished within 120 days of the filing of the complaint, the district court in its discretion may either dismiss the action without prejudice or order service within a specified time. Fed. R. Civ. Proc. 4(m). However, if the plaintiff can show "good cause" for an extension, the district court must extend the time for accomplishing service. *Tyson v. City of Sunnyvale*, 159 F.R.D. 528, 530 (N.D. Cal. 1995).

Plaintiff, an active California attorney, failed to provide this Court evidence of service on Defendant Manhattan Life Insurance Company, and *cannot* show evidence of service within 120 days as required by Federal Rule of Civil Procedure 4(m). Therefore, dismissal with prejudice of Defendant Manhattan Life Insurance Company is required under Federal Rule of Civil Procedure 4(m), as discussed more fully in section IV.

IV. PLAINTIFF'S CLAIMS AGAINST MANHATTAN LIFE INSURANCE DO NOT RELATE BACK REQUIRING DISMISSALS

1. Federal Rules Bar Plaintiff's Claims For Failure to Relate Back

Under federal law, as Defendant Manhattan Life Insurance Company discussed at length in its opening papers, absent a "mistake" in failing to name a defendant in the original complaint under Rule 15(c)(3), there can be no relation back. (See Motion to Dismiss. Br. 6-10.) In Opposition, Plaintiff argued that there is no prejudice to Defendant Manhattan Life Insurance Company, for the conclusion that this Court may waive application of the Rules of Federal Procedure.

However, the issue for determination is *mistake*, not prejudice. The Ninth Circuit has held that plaintiffs cannot take advantage of Rule 15(c) where there was no mistake of identity, but only a conscious choice of whom to sue. (*See Louisiana-Pacific Corp. v. ASARCO Inc*, 5 FD. 3d 431, 434 (9th Cir. 1993).

In ASARCO, the Court affirmed the district court ruling of summary judgment against the appellant's ("ASARCO") third-party complaint that was filed

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after the applicable state law statute of limitations period had expired. ASARCO sold copper slag (a by-product of the copper smelting process) to a subsidiary of a company called IMP, under an agreement that the subsidiary would pay ASARCO a portion of the proceeds it received from re-selling the copper slag. The end-users of the copper slag, however, discovered that the copper slag caused heavy metals to leach into the ground water. The end-users then sued ASARCO for the environmental clean-up costs. ASARCO, in turn, filed a third-party complaint for indemnification and contribution against L-Bar Products, Inc., ("L-Bar"), alleging that it was the successor in interest to IMP. The district court dismissed L-Bar on the grounds that it was not the successor-in-interest to IMP. ASARCO later filed a motion to add IMP as a third-party defendant, but the statute of limitations against IMP had already expired. Although the district court granted ASARCO's motion for leave to add IMP as a third-party defendant, the district court ultimately granted summary judgment in favor if IMP based on the statute of limitations.

On appeal, the Ninth Circuit in ASARCO rejected ASARCO's argument that its third-party complaint against IMP should relate back to the date of its third-party complaint against IMP's alleged successor L-Bar, and held that ASARCO did not establish that it made a mistake of identify under Rule 15(c) in failing to sue IMP within the applicable statute of limitations. (*Id.* at 434-35.) The Ninth Circuit reasoned that,

> "ASARCO didn't make a mistake. ***It knew who those parties were*** and ***made a mistake in who it determined it ought to sue*** under the circumstances. The mistake under Rule 15(c) has to be as to identity, and there was no mistake as to identity of IMP…There was no mistake of identity, but rather a conscious choice of whom to sue." (*Id.* at 434-35)(emphasis added)

Here, Plaintiff was undisputedly aware of Manhattan Life Insurance Company when he filed his original complaint naming Manhattan Insurance Group

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only. The December 12, 2011 Declaration of Kenneth P. Fehl in Opp. makes clear that at all relevant times he knew of the identities of both Defendants, but simply elected to exclude Manhattan Life Insurance Company from the original Complaint. (See Fehl Decl. ¶ 9 (stating under penalty of perjury that in 2000, Defendants "notified" him that the Manhattan Life Insurance Company was a Manhattan Insurance Group Company," and attaching a copy of letter as exhibit "C"). Having conceded in his declaration his knowledge of both these Defendants, Plaintiff cannot now argue that he was ignorant of the name of either of these Defendants.

2. Should The Court Apply California State Law Relation Back Rules, Plaintiff's Claims Are Time Barred In Any Event.

The general rule in California is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied *as of the date the amended complaint is filed*, not the date the original complaint is filed. (*McGee Street Prods v. Workers' Compensation Appeals Bd.*, 108 Cal. App. 4th 717, 724-25 (2003)). Section 474 of the California Code of Civil Procedure serves as an exception to this general rule by permitting the substitution of a new defendant for a fictitious Doe defendant named in the original complaint against whom plaintiff asserted a cause of action in the original complaint. *Id.* Section 474 provides, in relevant part: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. . . ." (Cal. Code Civ. Proc. § 474.)

To comply with this statute, and thereby fall within the exception to the general rule, a plaintiff must have been "genuinely" ignorant of the newly added defendant's identity at the time a plaintiff filed her original complaint. (*Taito v. Owens Corning*, 7 Cal. App. 4th 798, 802 (1992); see also *Scherer*, 64 Cal. App.

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3d at 840 ("Ignorance of the true name of the defendant should not be feigned.")). The omission of the defendant's identity in the original complaint must be real and not merely a subterfuge for avoiding the requirements of section 474. (*Id.*, *see also Ingram v. Superior Court*, 98 Cal. App. 3d 483, 491 (1979). If a plaintiff cannot satisfy this requirement, a new defendant may not be added after the statute of limitations has expired. *Id.*[2]

Furthermore, a plaintiff should also identify the newly added, and previously unknown defendant, specifically as a substitute for the previously named fictitious defendant. *Ingram*, 98 Cal. App. 3d at 490-92. As one California court has held, "[w]hile we recognize the Supreme Court's liberal attitude toward allowing amendments of pleadings to avoid the harsh result imposed by a statute of limitations, that attitude is not unfettered by reasonable requirements. Some discipline in pleading is still essential to the efficient processing of litigation." *Id.*

As discussed, Plaintiff was not at all "ignorant of the name of a defendant" when it filed its original complaint, *only* naming Manhattan Insurance Group. (Cal. Code Civ. Proc. § 474.) To the contrary, with respect to Manhattan Life Insurance Company, the December 12, 2011 Declaration of Kenneth P. Fehl in opposition. makes clear that at all relevant times, he knew of their identities, but simply elected to exclude them from the original complaint. (*See* Fehl Decl. ¶ 9 (stating under penalty of perjury that in 2000, Defendants "notified" him that "Manhattan Life Insurance Company was a Manhattan Insurance Group Company," and attaching a copy of letter as exhibit "C"). Plaintiff admitted knowledge of both Defendants, and cannot now argue ignorance.

The operative First Amended Complaint failed to allege any additional facts discovered between the filing of the original complaint and the First Amended

[2] Accord *Stephens v. Berry*, 249 Cal. App. 2d 474, 477 (1967) ("The decided cases have made it clear that a plaintiff's ignorance, to satisfy the statute, must be genuine, that is, real and not feigned."); *Lipman v. Rice*, 213 Cal. App. 2d 474, 477 (1963) ("ignorance of the true names" must be "real and not feigned"); *Noble v. Merchants National Realty*, 248 Cal. App. 2d 48, 51 (1967).

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Complaint which would explain when and how Plaintiff "discovered" the identities of Manhattan Life Insurance Company and its alleged role in the purported wrongdoing. (*Scherer*, 64 Cal.App.3d at 841. ("Nowhere in any pleadings or declarations did plaintiff ever say what new facts she discovered."))

Since Plaintiff knew the identities of both Defendants more than four years ago; knew of his purported injury more than four years ago; failed to even assert his original pleading for approximately four years; utterly fails to allege any facts he supposedly learned about Manhattan Life Insurance Company between the filing of his original complaint and the First Amended Complaint that may have led him to attempt to replace "John Doe" defendants with the Manhattan Life Insurance Company; and fails to allege expressly the substitution of "John Doe" defendants he now claims, the Court should find that Plaintiff's claimed ignorance under section 474 cannot be "genuine," and deny any relation-back argument.

V. PLAINTIFF CONCEDES NEED FOR A MORE DEFINITE STATEMENT ON CLAIM FOR BREACH OF ORAL AGREEMENT.

In apparent agreement with the Defendants' motion to dismiss the claim for breach of oral agreement, Plaintiff does not offer any argument in opposition. Instead, Plaintiff provides a narrative response of confusing factual assertions which are not contained in the operative First Amended Complaint. (Opp. at 5:15-26, 6:1-2.) Therefore, the Defendants' motion to dismiss should be granted as to this count, requiring a more definite statement. (*McHenry v. Renne*, 84 F3d 1172 (9th Cir. 1996)).

VI. CONCLUSION

Plaintiff did not state a viable claim against Defendants based on breach of contract and breach of covenant of good faith and fair dealing because he failed to file suit within the applicable statue of limitations. Accordingly, his complaint is

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barred. Moreover, due to the peculiar relation-back faults in adding Defendant Manhattan Life Insurance Company in an untimely manner, any attempt to amend the complaint as to Defendant Manhattan Life Insurance Company would be futile.

Plaintiff has also failed to state a viable cause of action for breach of an oral agreement. Therefore, Defendants respectfully requests that its motion to dismiss be granted on this ground as well.

Dated: December 20, 2011

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By: /s/ A. Louis Dorny
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP, 633 West Fifth Street, 52nd Floor, Los Angeles, CA 90071. On December 20, 2011, I served a copy of the documents described as:

REPLY IN SUPPORT OF MANHATTAN INSURANCE GROUP AND MANHATTAN LIFE INSURANCE COMPANY'S MOTION TO DISMISS

VIA FACSIMILE: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 4:00 p.m.

☒ VIA U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at Los Angeles, addressed as set forth below.

BY OVERNIGHT COURIER: by placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery as part of the ordinary business practices of Gordon & Rees LLP described below, addressed as set forth below.

VIA ELECTRONIC CASE FILING: I filed electronically the document(s) listed above, using the CM/ECF's electronic case filing service. Counsel of record is registered to file electronically with this Court, and receive copies of the documents via e-mail from the court to confirm filing.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on December 20, 2011, at Los Angeles, California

Mila Owen

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